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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL FLEMING and ANASTASIA FLEMING,

Petitioners,

– against –

ALLSTATE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

PETITIONER'S REPLY BRIEF

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12 pp

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Statement of the Case	2
ARGUMENT	
I - THE LAW OF NEW YORK STATE IS THAT PUNITIVE DAMAGES ARE NOT AVAILABLE IN BREACH OF CONTRACT CASES	5
II - ALLSTATE MISUSES A CASE TO SUPPORT ITS MISSTATEMENT OF NEW YORK LAW	7
III - THE CONSTITUTIONALITY OF PUNITIVE DAMAGES IS A RECENT ISSUE BEING ADDRESSED BY THIS COURT AND IS OF GREAT PUBLIC IMPORTANCE	8
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
Aetna Life Ins. Co. v. Lavoie, 470 So. 2d 1060 (Ala. 1984)	8
Allen v. McCurry, 449 U.S. 90, 105	8
Borkowski v. Borkowski, 39 N.Y. 2d 982	7
Greenspan v. Commercial Ins. Co., 57 A.D. 2d 387	7
P.S. Auctions, Inc. v. Exchange Mut. Ins. Co., 105 A.D. 2d 473, 480 N.Y.S. 2d 610 (3d Dept. 1984)	7
Queensbury Union Free School District v. Jim Walter Corporation, 101 AD2d 992, 993, aff'd 64 NY2d 964	5
Texaco, Inc. v. Pennzoil Company, United States Court of Appeals for the Second Circuit Index No. 86-7046, 7052	6, 9
Sumner v. Mata, 449 U.S. 539, 549	8
Willis v. Shearson/American Express, Inc., 569 F. Supp. 821	8
Willoughby Roofing & Supply Co. v. Kajima International, Inc., 598 F. Supp. 353, aff'd 776 F. 2d 269	8

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PRELIMINARY STATEMENT

In real life, the bad guy wins because he lies and cheats. If you play fair, you lose.

Mia Farrow at the turning point of Woody Allen's *The Purple Rose of Cairo.*

In this case, Mrs. Fleming and her son, Michael, played fair. They bought automobile liability insurance as they were required to under New York law. They paid the correct premium, provided Allstate with documentation to establish the correct

premium, notified Allstate when the accident occurred and in every way, fulfilled their obligations under the contract. As a result of playing fair, they lost. Allstate refused to indemnify and defend them and a judgement was therefore entered against them. Their driver's licenses and automobile registration was revoked. They were forced to bring a lawsuit to suspend the revocation of their licenses and registration, another to force Allstate to fulfill its obligations under the contract and another to recover the expenses incurred as a result of having been sued by injured third parties.

Allstate committed the crimes of perjury, fraud, forgery, falsification of business records, slander, etc. to avoid fulfilling its contractual obligations to defend and indemnify. As a result of lying and cheating, Allstate won. It avoided paying an innocent, injured third party; the damages it paid as a result of the two lawsuits brought against it and its litigation costs were less than the policy limits; and it gained interest that it would not have earned had the claim been settled promptly.

STATEMENT OF THE CASE

Allstate is now attempting to relitigate facts which have already been adjudged. Allstate once again attempts to prove mailing of the cancellation notice by means of a statement from an insurance agent, who claims to be an agent for Allstate and therefore under its control. The court in the declaratory action specifically found that mailing was not proved because the affidavit of mailing contained an untruth, the mail clerk having sworn on April 8, 1977 that he mailed the notice on April 12, 1977, when, he in fact could not have mailed it.

Allstate did not have the courage to appeal this finding which deals with its falsification of business records but now attempts to resurrect the issue before this Court.

Allstate previously tried to relitigate this issue in the action for damages by means of an affirmative defense. The lower court dismissed this defense (Petition pages A-14-15.) because of the unappealed ruling of the court in the declaratory action. Again,

Allstate lacked the courage to appeal this finding, and seeks to relitigate it here.

Allstate also tries to relitigate the issue of whether there was ever an interview with Anastasia Fleming. Allstate never submitted any proof that Anastasia Fleming stated in an interview that Michael Fleming was the principal driver, and admitted it had none. It admitted that it had received documentation that it received documentation that he was not. It also admitted that it had only one record indicating that he was the principal driver — a memo written about one year after the attempted cancellation when Allstate was on notice that an accident had occurred. Clearly the memo is a forgery made for the purpose of avoiding payment of a legitimate claim.

The Flemings alleged that Allstate's conduct constituted bad faith, was morally culpable, outrageous, and malicious and was part of a scheme in its dealings with the general public to engage in fraudulent activity; the latter reaching a level of wanton dishonesty equivalent to a criminal indifference to civil obligations, i.e. a public wrong under New York law. They alleged, fraud, perjury, forgery, falsification of business records, etc. Two lower court rulings (Petition pages A 7-15.) upheld the allegations as sufficient for a claim for punitive damages.

Allstate appealed the decision of the lower court which denied its motion for summary judgement. The Appellate Division Second Department dismissed the claim for punitive damages, finding that allegations of fraud, public wrong, perjury, forgery, falsification of business records, etc. were insufficient for punitive damages in breach of contract cases, a finding that no conduct by an insurance company, no matter how outrageous or dishonest, and no matter how pleaded or repleaded can ever reach the standard of moral culpability necessary for punitive damages in New York State.

The Court of Appeals affirmed this decision, ruling that punitive damages are not available in breach of contract cases. All issues raised in the Flemings' petition were raised before the

Court of Appeals, as well as the lower courts. The issue of public wrong was argued as well as the right to a jury trial to determine whether punitive damages were warranted, protection of their rights under contract, equal protection, due process, etc. and these issues are therefore preserved.

The orders granted in this case were made by decision of a motion for summary judgement. No trial was held.

ARGUMENT

I

THE LAW OF NEW YORK STATE IS THAT PUNITIVE DAMAGES ARE NOT AVAILABLE IN BREACH OF CONTRACT CASES

Allstate misstates the law regarding punitive damages in breach of contract cases.

In its decision of this case, the New York State Court of Appeals cited the case *Queensbury Union Free School District v. Jim Walter Corporation*, 101 AD2d 992, 993, affd 64 NY2d 964.

In that case, the Court of Appeals held that a plaintiff could not amend a complaint to allege fraud to invoke a longer Statute of Limitations when the allegations of fraud were incidental to a complaint that was contractual in nature.

The Court of Appeals therefore determined that the Flemings allegations of public wrong, fraud and other morally culpable conduct were incidental to a complaint that was contractual in nature and therefore would not support a claim for punitive damages. It is a decision that punitive damages can never be obtained in a breach of contract action. The Court of Appeals, however, gave no reasoning for its determination that punitive damages cannot be awarded in a breach of contract suit even when the acts complained of are essentially tortious in nature.

The petitioners alleged public wrong and argued that an automobile liability insurance policy involved the rights of third parties, and that to allow an insurance company to breach this sort of contract and to engage in morally culpable conduct while doing so, defeated the public policy as set forth by the New York State Legislature when it mandated that all automobile owners must purchase liability insurance or forfeit their license and registration so that injured victims would be assured of and actually receive compensation for their injuries and losses.

The Court of Appeals decision (Petition p. A-1) did not find that petitioners failed to make sufficient allegations of public wrong, it found that the allegations were incidental to the breach of contract and would therefore not sustain a claim for punitive damages; and, that insurance companies cannot be held liable for punitive damages even when they breach automobile liability insurance contracts in which the beneficiaries are third parties rather than the persons purchasing the insurance.

The principal that punitive damages cannot be awarded in breach of contract cases is being cited as the law of New York State in cases in the State courts as well as in the Federal Courts. *Texaco, Inc., v. Pennzoil Company*, United States Court of Appeals for the Second Circuit Index No. 86-7046, 7052.

The parties to that case have agreed to have New York law applied to that action. Texaco is relying on the New York rule that punitive damages are not available in breach of contract cases not only in its action to avoid posting a supersedas bond in the judgment's full amount of $11.12 billion, which it brought in a Federal Court in New York State, but also to contest the judgment in its appeal in the Texas Courts, where in addition to other issues, Texaco will try to have the award of $3 billion in punitive damages overturned.

The New York State law that punitive damages are not available in breach of contract cases was cited in that case in both the Federal District Court and the U.S. Court of Appeals and the verdict was determined by that law. The decision of whether this New York law is constitutional will effect the final outcome of the case *Texaco v. Pennzoil*.

II

ALLSTATE MISUSES A CASE TO SUPPORT ITS MISSTATEMENT OF NEW YORK LAW

Allstate cites the case *P.S. Auctions, Inc. v. Exchange Mut. Ins. Co.*, 105 A.D. 2d 473, 480 N.Y.S. 2d 610 (3d Dept. 1984), a case which was not appealed to the Court of Appeals and which was decided prior to the Court of Appeals decision in this case.

In the case *Borkowski, v. Borkowski*, 39 N.Y. 2d 982, the Court of Appeals decided that punitive damages were available in fraud cases. The Appellate Division, Third Department, subsequent to that decision, held that by logical extension, punitive damages would also be available in breach of contract cases. *Greenspan v. Commercial Ins. Co.*, 57 A.D. 2d 387; *P.S. Auctions, Inc. v. Exchange Mut. Ins. Co.*, supra. The Appellate Division, Second Department continued to hold that punitive damages were not available in breach of contract cases. As a result, there was a split between the Appellate Divisions which has now been healed by the Court of Appeals without setting forth its reasoning.

Clearly, as Allstate well knows, the Third Department cases have been reversed by the Court of Appeals in its decision of this case, and its argument that the *P.S. Auctions* case is the law of New York State is untenable. Clearly, Allstate also knows that the Court of Appeals set forth no reasoning for its finding that the Appellate Division Third Department's finding that the punitive damages are available in breach of contract actions are incorrect or why the Second Department's findings are correct. It sets forth no reasons why insureds should not stand equal to insurance companies as parties to a contract, or why insurance companies should be allowed to sell lawsuits instead of the protection motorists are required to buy for the public good.

III

THE CONSTITUTIONALITY OF PUNITIVE DAMAGES IS A RECENT ISSUE BEING ADDRESSED BY THIS COURT AND IS OF GREAT PUBLIC IMPORTANCE

The question of the constitutionality of punitive damages in insurance cases has only recently come before this Court in the case *Aetna Life Ins. Co. v. Lavoie*, 470 So. 2d 1060 (Ala. 1984), and no decision has yet been rendered.

The cases *Robb v. Connolly*, III U.S. 624, 637; *Sumner v. Mata*, 449 U.S. 539, 549; *Allen v. McCurry*, 449 U.S. 90,105; while not dealing specifically with punitive damages, have similar issues with this case and provide precedent for this Court to find that the New York law prohibiting punitive damages in breach of contract cases is unconstitutional and to bring New York law into conformity with federal laws which allow punitive damages in breach of contract cases in certain instances.

Willoughby Roofing & Supply Co. v. Kajima International, Inc., 598 F. Supp. 353, affd. 776 F. 2d 269; Willis v. Shearson/American Express, Inc., 569 F. Supp. 821.

This Court has already determined that the issue of whether punitive damages are constitution is of public importance by deciding to hear the case *Aetna Life Ins. Co., v. Lavoie*, supra.

Aetna Life Insurance Co. is trying to have punitive damages declared unconstitutional. The petitioners herein seek to have the denial of punitive damages declared unconstitutional because that denial has deprived them of due process and equal protection of the laws, interferes with their right to contract and they have been denied the right to trial by jury, in violation of the U.S. and New York State Constitutions.

The issues raised by the petitioners balance the issues raised by Aetna Life Insurance. Each case raises a different side of the question and therefore, both cases should be considered simultaneously.

This Court's decision in this case is also of public importance because it will affect the outcome of the case *Texaco v. Pennzoil*, which partly relies on New York law in breach of contract cases. *Texaco v. Pennzoil* will also be before this Court either on an appeal from the recent decision of the U.S. Court of Appeals Second Circuit or on appeal from the final decision of the highest Texas Appellate Court.

The Court's decision in this case will determine whether the award of punitive damages to Pennzoil can stand.

CONCLUSION

For the reasons contained herein and in the petition, a Writ of Certiorari should be granted.

Respectfully submitted,

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